Supreme Court, U.S.
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No. 98-1971

In The

Supreme Court of the United States

DANIEL ROBINSON; et al. ("Class I");
Petitioners/Defendants,

vs.

ADMINISTRATIVE COMMITTEE OF THE
SEA RAY EMPLOYEES' STOCK OWNERSHIP &
PROFIT SHARING PLAN et al.
Respondents/Plaintiffs,

and

SHARON BALDOCK; et al. ("Class II")
Respondents/Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO THE BRIEFS IN OPPOSITION

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Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard.

B.

Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred.

C.

Whether a Plan Administrator's Decision May be Upheld on Grounds Other Than Those Given or Considered by the Plan Administrator Regardless of the Standard of Review.

II.

Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred.

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Argument

I.
A.

Whether, under ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), the Language in the Respondent's Employee Stock Ownership and Profit Sharing Plan was Sufficient to Permit Review under the Arbitrary and Capricious Standard.

For purposes of the petition for certiorari the issue is ***not*** whether the courts of appeals disagree on how to interpret ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101(1989). Respondents acknowledge (somewhat begrudgingly) the split of authority on this issue. Committee brief p. 13 (referring to the "asserted conflict") Class II brief p. 17 ("While it is true that the circuits ***disagreed***. . . .)

Before addressing Respondents' arguments in opposition to the petition, however, Petitioners invite the Court's attention to the decision in ***Kinstler v. First Reliance Standard Life Insurance Co.***, 181 F.3d 243 (2nd Cir. 1999), pet. for rehearing & sug. reh. en banc den. Aug. 18, 1999, of which Petitioners were not aware until after their petition was filed. The plaintiff in ***Kinstler*** sought long term disability benefits, which the plan denied for essentially factual reasons. Plaintiff sought judicial review, arguing that the plan administrator's decision was subject to de novo review under ***Firestone***. The court of appeals agreed.

The Second Circuit acknowledges that "***appellate judges are divided on the issue of what language suffices to convey to plan administrators the discretionary authority*** that warrants the more deferential arbitrary and capricious standard

of review." 181 F.3d at ___ (emphasis added). The plan language at issue in ***Kinstler*** is similar to the plan language at issue in ***Kearney v. Standard Insurance Co.***, 175 F.3d 1084 (9th Cir. 1999) (en banc), petition for cert. filed no. 99-186, 68 U.S.L.W. 3131, and ***Perez v. Aetna Life Ins. Co.***, 150 F.3d 550, 555 (6th Cir. 1998) (en banc). Following ***Kearney*** and rejecting ***Perez***, the Second Circuit held that the ambiguous language in the plan was not sufficient to convey discretionary review status. The Second Circuit reasoned that because the plan administrator bears the burden of proving that the arbitrary and capricious standard applies, needless ambiguities should be resolved against the plan administrator:

> Though we reiterate that no one word or phrase must always be used to confer discretionary authority, the administrator's burden to demonstrate insulation from de novo review requires either language stating that the award of benefits is within the discretion of the plan administrator or language that is plainly the functional equivalent of such wording. Since clear language can be readily drafted and included in policies, even in the context of collectively bargained benefit plans when the parties really intend to subject claim denials to judicial review under a deferential standard, courts should require clear language and decline to search in semantic swamps for arguable grants of discretion.

___ F.3d at ___. The issues in ***Kinstler*** are the same issues raised in parts A and B of question 1 in the petition.

Respondents (which will be referred to individually as the Committee or Class II) attempt to distinguish the instant case from the acknowledged split of authority. But Respondents' arguments begin with an invalid assumption: that certiorari should only be granted if there is a disagreement in how to

interpret specific plan language. Committee brief p. 12. Aside from the fact that Petitioners have shown there is a dispute between the Sixth Circuit and the Eleventh Circuit with respect to plan language similar to the language in the Sea Ray plan, pet. cert. p. 11-12, Respondents' arguments would relegate this Court to the role of an arbitrator. What is needed are principles for lower courts to follow in determining whether a plan requires deferential review. Whether there is a dispute over how to interpret similar language is not the issue.

While Class II accuses Petitioners of "attempting to draw broad conclusions from judicial determinations that were intensely factual," Class II brief p 18, the very fact that ERISA cases (and these issues in particular) are "intensely factual" establishes the need for guidance from the Court. With 9,000 ERISA claims filed each year, federal courts are hip deep in ERISA claims. Pet. Cert. p. 20. They do not have the resources to "search in semantic swamps for arguable grants of discretion." ***Kinstler***, 181 F.3d at ___.

Respondents, accompanied by the Sixth Circuit, argue that the Plan required discretionary review because it gave the Committee the authority to determine who is eligible to be a "participant," the "amount" of benefits, and determine "allocations to participants accounts." Each argument is incorrect. Determining whether a statutory "partial termination" has occurred has ***absolutely nothing*** to do with "participant" status; it has even less to do with the "amount" of a benefit. The class members are, by definition, "participants" or else they would not be parties to this action. ***Firestone***, 489 U.S. at 117-18. Furthermore, no one has ever made a rational argument that the partial termination inquiry considers the "amount" of benefits that might be received.

Likewise, the Committee's argument that discretion is found in a grant of authority to "determine allocations" ignores

the fact that the plan ***expressly limits*** this authority to a plan provision separate and distinct from the plan provision that contains the partial termination language. ***See*** App. 97, 100. And it is telling that even the Committee does not attempt to defend the Sixth Circuit's reasoning that a provision (§ 16) in the plan that clearly ***limits*** the Committee's discretion "clearly ***grants*** discretion." ***Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson***, 164 F.3d 981, 986 (6th Cir. 1999) (emphasis added), reprinted at App. 9.

Characterizing the Sea Ray plan as establishing a "clear grant of discretion" Committee brief p. 12-13, is inconsistent with ***Kinstler***, not to mention the decisions set forth in the petition on pages 9 to 13. If this plan requires discretionary review, then so will just about any plan language, no matter how ambiguous it may be. Petitioners do not believe this is what the Court intended when it decided ***Firestone***.

There is a sound reason for requiring unambiguous language. As one court observed,

> We do not want to encourage an employer to insulate himself from effective appellate review through the abuse of vague phrases that fail to make clear to the employees that the employer will have the final determination of benefit decisions. Employees who lose promised benefits should not lose the additional benefit of judicial review because their employer reserved discretionary power to itself without making that reservation clear.

Bogue v. Ampex Corp., 976 F.2d 1319, 1325 (9th Cir. 1992).

Respondents' argument that the petition merely presents an "intensely factual" issue overlooks the fact that the underlying

issue is ***always*** going to be plan language dependent. "Different contractual language justifies different results." ***Carpenter Local 1027 v. Lee Lumber & Building Material Corp.***, 2 F.3d 796, 800 (7th Cir. 1993). Petitioners are not asking this Court merely to "get involved in parsing the language of the Sea Ray Plan." Committee brief p. 14. Rather Petitioners respectfully submit that the Court needs to provide guidance with respect to the clarity of discretionary language in a plan which will insulate a plan administrator's decision from de novo review.

B.

Whether ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101 (1989), Requires Deference to a Plan Administrator's Interpretation of a Federal Statute (26 U.S.C. § 411(d)(3)) and/or its Factual Findings that a Partial Termination Had Not Occurred.

C.

Regardless of the Standard of Review, May A Federal Court Uphold A Plan Administrator's Decision on Grounds Other Than Those Given or Considered by the Plan Administrator.

Neither Respondent addresses question 1.B. and 1.C as they were presented in the petition. Instead, like the court of appeals, they re-characterize question 1.B. as whether ***Firestone*** applies to a plan administrator's decision concerning a "question of law."

But Class I has repeatedly argued that even if a court might defer to a plan administrator's "legal conclusions," in so far as

it interprets the terms of the plan, a court should ***never*** defer to a plan administrator's interpretation of a federal statute. If anything, the Committee's brief re-enforces Petitioner's contention that there is a split of authority among the federal courts on this issue. Committee brief p. 15-16.

The window dressing Respondents put on the court of appeals' decision cannot hide the fact that the Sixth Circuit held ***Firestone*** requires a court to defer to a plan administrator's interpretation of a federal statute where the plan incorporates the terms of the statute.[1] The Committee asserts that the Court should not "expend its limited resources reviewing the unexceptionable, fact-specific application of a well-established multi-factor test." Committee brief p. 15. But if this test is so "well-established" why didn't the Committee apply it in reaching its decision? The only factor given serious consideration by the Committee was whether there was "plan abuse." App. 83, 85. While there is no dispute that this is ***one*** of the factors to consider, it was the ***only*** factor given any weight by the Committee. The Committee's chair testified that it did not give significant consideration to the percentage of participants who were excluded from the plan, App. 85, a factor the Sixth Circuit had previously characterized as "significant" and "generally the most persuasive." ***Kreis v. Charles O. Townley, M.D. and Associates, P.C.***, 833 F.2d 74, 79 (6th Cir. 1987); ***see Weil v. Retirement Plan Administrative Committee of The Terson Co., Inc.***, 933 F.2d 106, 110 (2nd Cir. 1991) ("The IRS has informed us that it believes a partial termination may occur if there is 'a significant contraction of a plan, ***such as*** a significant reduction in the number of plan participants' and 'all terminated participants, both vested and non-vested,

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[1] It should also be remembered that a plan must provide for the occurrence of a partial termination in order to obtain favorable tax treatment. 26 U.S.C. § 411(d)(3); 26 U.S.C. §401(a)(7).

should be counted in determining whether a partial termination has occurred.'" (Emphasis added)).

For the two plan years in question (1989-90, 1990-91), participation in the plan dropped from 4,084 to 1,968, i.e., more than 50 percent. App. 38-39. Employment during this period dropped from 4,425 to 2,028, again, a drop of more than half. App. 37-38. The Committee never considered the reason these participants were excluded (i. ., voluntary departures or involuntary layoffs) or why the employment rolls dramatically decreased. Indeed, data regarding constructive discharges was not compiled until after the committee made its decision. App. 67. Few departing employees were replaced and the above figures account for the few replacements that were hired.

Despite the fact that the Committee failed to apply its self-described "well-established multi-factor" test, the Committee's decision was upheld as "reasonable." Even administrative agencies do not have the authority to disregard judicial interpretations of a statute. ***Lechmere Inc. v. NLRB***, 502 U.S. 527, 537 (1992); ***Maislin Industries, U.S. Inc. v. Primary Steel, Inc.***, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.")

Respondents' miscast question 1.C as being whether a court can affirm a plan administrator's decision on "evidence before the Committee." Committee brief p. 19; see also Class II brief p. 24. This misses the point. The question is whether the Committee's stated grounds for its decision were those on which it sought to be affirmed upon judicial review.

Once the Committee commenced this litigation, the Committee persuaded the lower courts to affirm its decision on

grounds which were ***never*** considered or relied upon by the Committee. One such ground was that the termination percentage should be broken down into separate plan years because of the imposition of a federal luxury tax. The Committee now asserts that it was "well aware" of the effect of the luxury tax. Committee brief p. 19. But this fact, even if true, is irrelevant because the chair of the Committee testified that the Committee did ***not*** separate the percentage reductions in the plan by plan year. App. 85.[2]

In its brief, the Committee asserts that it actually considered "figures on terminations as reflected on Sea Ray's Plan Termination Reports . . . ***including*** the reasons for those terminations. Committee brief pp. 5 & 18. The Committee's assertion misstates the record because the "Plan Termination Reports" it claims to have relied upon in 1992 were ***not developed*** until 1995. The Committee, in other words, has again offered a justification that it did not articulate or consider at the time of its decision.

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[2] As if to bolster the Sixth Circuit's decision, the Committee asserts that, even if the plan years were combined, the percentage of involuntarily terminated participants would be "less than 38%." Committee brief p. 20. The Committee baldly asserts that there is a 15-20% average "industry turnover rate." These were not facts relied upon by the Committee or the Sixth Circuit and there is no evidence that Sea Ray's turnover rates were in this range. In fact, there was no genuine "turnover;" few employees who left were replaced. Their departure added to the dimension of the layoff and allowed Sea Ray to reduce its workforce through layoffs and "voluntary departures." App. 67-68. To apply a turnover rate where "voluntarily" departing employees have already been excluded would count non-replaced employees twice, thus inappropriately reducing the percentage of excluded plan participants.

The infirmity of the Sixth Circuit's decision can be summed up by quoting the testimony of the Committee's chair: "It wasn't something that we studied very carefully." App. 84.

In recounting these facts, Petitioners are not asking the Court to reverse the lower courts simply because they drew incorrect conclusions from the facts set before them. What that matters at this stage is whether or not a court should defer to a plan administrators' interpretation of a federal statute. Indeed, should the Court ultimately agree with Petitioners' on this point a remand would be the appropriate course of action.

II.

Whether, on an Appeal from a Decision Granting Summary Judgment, the Court of Appeals Properly Applied the Clearly Erroneous Standard of Review to Conclusions Crucial to the District Court's Holding that a Partial Termination of an ESOP Had Not Occurred.

Respondents also concede (as they must) that the Sixth Circuit applied the incorrect standard of review. The Committee assets this error was harmless because the district court properly found the Committee's decision (on the constructive discharge issue) was reasonable. What the Committee fails to admit is that it never addressed the constructive discharge issue until after the litigation commenced. Data regarding voluntary/involuntary terminations was not compiled until well after the committee made its decision. App. 67. As has been shown in the discussions about Questions 1.B. and 1.C., the district court did not merely review the Committee's decision but based its decision, in significant part, on grounds never considered, much less relied upon, by the Committee.

Conclusion

For the reasons herein discussed, petitioners pray that this petition for a writ of certiorari should be granted and that a writ of certiorari issue to review the decision and judgments of the United States Court of Appeals for the Sixth Circuit entered on January 14, 1999 and March 11, 1999.

Respectfully submitted,

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